IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.294 OF 1999

Smt.Tanubai Baburao Nanekar ...Appellant

Vs.

Shankar Ganpat Shelke & Ors. ...Respondents.

Mr.G.S.Godbole for the Appellant
Ms Suhasini Mutalik for the Respondents.

CORAM: A.S.OKA,J.
DATE : FEBRUARY 24, 2005.

ORAL JUDGMENT:

1. Heard Counsel appearing for the parties. My attention has been invited to the order dated 3rd August 1999, passed by this Court which reads thus :

. "Heard Mr.Godbole for the appellants.

. In my view as far as the dismissal of the suit filed by the appellants is concerned, there is no error in the orders passed by the courts below. However, as far as the entertaining of the Counter Claim of the respondents is concerned, Mr.Godbole points out that the plea of limitation raised by the appellants was not considered by the Appeal Court. Notice to the respondents, returnable on 24/8/1999.

. The respondents will not execute the decree until the

matter is further heard."

2. In view of the said order following substantial question of law arises :

. Whether the Appellate Court committed an error by not framing a specific point for determination on the basis of plea of bar of limitation raised by the Appellant so far as the counter claim of the Respondents is concerned ?

3. I have taken up the Appeal for final hearing forthwith.

4. The Appellant is the original Plaintiff. The Appellant filed a suit against the Respondents for declaration and permanent injunction on the ground that she has become owner of the suit property by adverse possession. In the said suit the Respondents filed counter claim claiming possession of the suit property on the basis of title. The Trial Court dismissed the suit. However the counter claim of the Respondents was decreed. The Trial Court held that the Appellant/Plaintiff has failed to prove that she has become owner of suit land by adverse possession. As the title of the Respondents was established, the Trial Court proceeded to pass a decree for possession in the counter claim. The Trial Court held that the counter claim was filed within stipulated period of limitation.

5. An Appeal was preferred by the Appellant-Plaintiff in the District Court. The said Appeal has been dismissed.

6. Shri Godbole, learned Advocate for the Appellant submitted that the Trial Court has specifically considered the issue whether the counter claim was barred by limitation. He submitted that the Appellate Court has not framed any point for determination on this aspect. He submitted that though by order dated 3rd August 1999 this Court has already taken a view that there is no substance in this Second Appeal in so far as the challenge to the dismissal of the suit filed by the Appellant is concerned, issue of bar limitation of the counter claim will have to be decided independently as counter claim is in the nature of a cross suit. He submitted that the burden is on the Respondent to establish that the counter claim was within limitation and therefore there will have to be an order of remand to the Appellate Court for deciding the merits of the counter claim filed by the Respondent.

7. The learned Counsel for the Respondent submitted that as the suit filed by the Appellant was for declaration that she has become owner of the suit land by adverse possession and as she has failed in her suit to establish the adverse possession, the counter claim which is filed by the Respondent on the basis of title has to be decreed. She has placed reliance on the Judgment of Apex Court reported in (2003) 7 S.C.C. page no.481 [Deva (dead) through LRs. Vs. Sajjan

Kumar (dead) by LRS.] and submitted that as the plea of adverse possession is rejected by the courts below, at highest the possession of the Appellant will become adverse from the date of institution of the suit by the Appellant. She submitted that in view of Article 65 of the Limitation Act, 1963, the limitation for filing counter claim will start from the date on which the possession of the Appellant become adverse i.e. date of filing of the suit in the year 1997. She submitted that as the dismissal of the suit filed by the Appellant stands confirmed by order dated 3rd August 1999, the decree passed in counter claim has to be confirmed and no order of remand is necessary.

8. Shri Godbole has relied upon an order of Tahsildar dated 31st December 1979 which is placed on record of the Trial Court and admitted in the evidence. He submitted that the said order establishes the hostile possession of the Appellant.

9. I have considered the rival submissions. The Trial Court while considering the case of the Appellant in the suit for declaration has recorded a finding that the Appellant was in possession from the year 1971-1972. The Trial Court, however, held that the Appellant has failed to establish the other ingredients of plea of adverse possession and held that her possession was not hostile. The Appellate Court has confirmed the said finding considering that the Appellant asserted the

right ink the suit property on the basis of inheritance. The Appellate Court has therefore held that the Appellant is not entitled to declaration. As observed in order dated 3rd August 1999, there is no error committed by the Courts below when it was held that the Appellant has failed to establish her case. After having perused the findings of Courts below on this aspect, I am of the view that the findings of fact recorded by the Courts are based on the legal evidence on record and there is no perversity in the same.

10. The other question is whether it is necessary to remand the matter to the Appellate court for considering the issue of limitation as regards counter claim. In so far as the Trial Court is concerned, it has made elaborate discussion on the said issue. The Trial Court has held that the counter claim is governed by Article 65 of the said Act of 1963. The Trial Court has noted that the Appellant has failed to establish the plea of adverse possession and the period of limitation for filing the suit governed by the Article 65 starts from the date on which possession of a Defendant becomes adverse. The Appellate Court has not framed a specific point for determination on this aspect. However, while deciding the point, the Appellate Court has dealt with the said aspect by observing that the Appellant-Plaintiff has failed to establish the adverse possession. If the finding of the courts below on the issue of adverse possession recorded against the Appellant is correct, the alleged adverse possession of the Appellant

will commence at highest from the date of filing of the suit in the year 1997 as held by the Apex Court in the case of Deva (supra).

11. In this view of the matter, by no stretch of imagination it can be said that the counter claim is not filed by the Respondent within a period of 12 years from the date on which the possession of the Appellant became adverse to the Respondents. The Appellate Court has noted that the title of the Respondents has been categorically admitted by the Appellant. Therefore, there is no necessity to remand the matter to the Appellate Court.

12. The Second Appeal is dismissed with no order as to costs.

13. At this stage on the request made by Shri Godbole, execution of the decree passed in the counter claim will remain stayed for a period of eight weeks from today.

JUDGE.